Supreme Court of the United States

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET AL., PETITIONERS

vs.

ARKANSAS NATURAL GAS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

FIRST SUPPLEMENTAL BRIEF FOR RESPONDENT

H. C. WALKER, JR.,
LEON O'QUIN
ARTHUR O'QUIN
ELIAS GOLDSTEIN,
Attorneys for Respondent.

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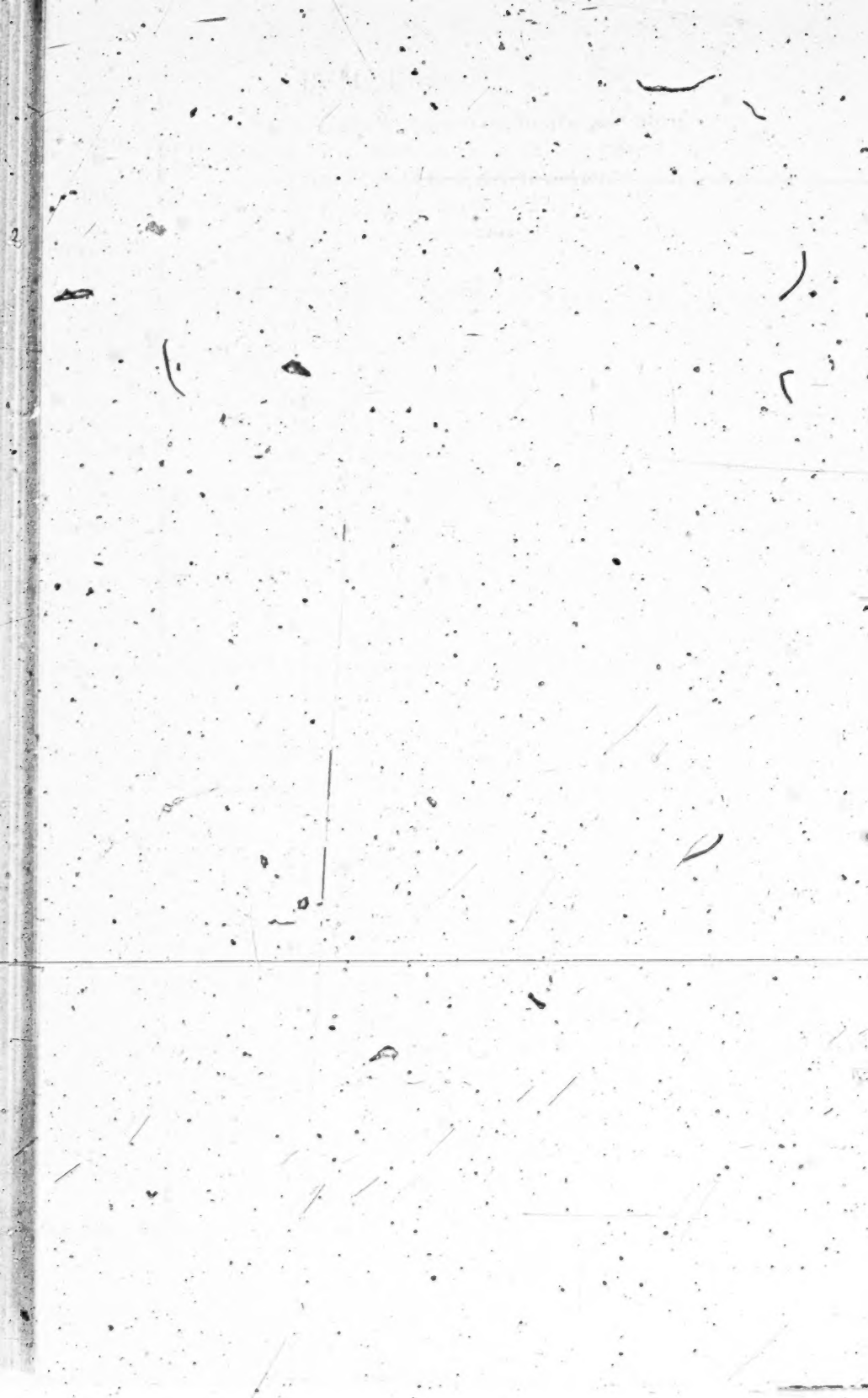

MAY IT PLEASE THE COURT:

So much interest was shown by the Court during the argument of this case in the matter of what evidence other than opinion evidence there is in the Record to support the judgment of the lower courts and in regard to the probative value (or lack of probative value) of the affidavit of the attorney for petitioners that we have concluded to file a short supplementary brief directing special attention to those parts of the Record which are relevant to these questions.

(1) The affidavit of Mr. R. H. Hargrove (**R. 53**) after stating his conclusion that the market price of gas at the well in the Richland Field during the period of interest here was 3¢ per MCF, bases it upon: (a) Various sales of gas by independent well owners at 3¢ or less. Mr. Hargrove names among these independent well owners T. L. James, Ruston Drilling Company, Richland Operating Company, Franklin Oil & Gas Company, W. C. Feazel, Sam D. Hunter, and Pelican Gas Company. (b) The sales of the lessors' royalty gas under ninety per cent of the leases in the field at 3¢ per MCF. Among these lessors was the State of Louisiana, the Department of Conservation of which is the repository of more information concerning oil and gas production and prices in Louisiana than is obtainable from any other source; and Mr. Hargrove states (**R. 54**) that "The State of Louisiana was among the lessors who received and accepted as correct royalty settlements for gas produced on the basis of 3¢ per MCF. (c) A substantial portion of the gas produced in the Richland Field was sold to carbon black plants and in almost every case the return to the seller was less than 3¢ per MCF. (d) "The Monroe gas field was brought in long before the Richland field, and is of much larger extent and importance, and in that field, there was established and generally recognized a price of 3¢ per

MCF for gas at the well. Much of the gas from the Monroe and Richland fields moved to a common market, and the ability of operators in the Richland field to supplement their gas supply from the Monroe field was one of the principal features in obtaining a satisfactory price for the Richland gas."

(2) The affidavit of Mr. E. N. Florsheim (**R. 60**) is to the effect that the Monroe field was in operation for ten years before the discovery of the Richland field and that there was a well recognized and established price of 3¢ per MCF for gas in the Monroe field which was the starting price for gas in the Richland field. Mr. Florsheim refers specifically to two sales made by him and his associates, one under the name of Richland Operating Company on July 27th, 1929 for twenty million cubic feet of gas per day at 3¢ per MCF for the first six months and thereafter based on the price of carbon black, which resulted in their subsequently receiving 1½¢ per MCF for gas thereafter delivered; and the other being the sale in the name of Franklin Oil & Gas Company to International Gas Products Company made on March 3rd, 1930 at 2½¢ per MCF. These were large contracts and deliveries were at the well in the Richland field.

(3) Mr. W. C. Feazel deposed (**R. 63**) that he had been in the oil and gas business, buying and selling leases and oil and gas lands, drilling wells and producing and selling oil and gas in different fields for twenty-five years and had been operating in the Monroe gas field for a number of years when the Richland field was brought in. He confirms Mr. Hargrove and Mr. Florsheim as to the established and recognized price in the Monroe field of 3¢ per MCF for gas at the well, and he reports sales made by him at 2½¢ per MCF from the Richland field with large deliveries of gas thereunder. He testifies (**R. 63**) as to the open market maintained by the United Gas Public Service Company for gas in the Richland field at the rate of 3¢ per

MCF on the basis of pro rata acreage production and states (**R. 64**) that at a time when he had a large quantity of gas available and could have sold it at 3¢ at the well, instead he sold his leases and wells because he had an advantageous offer for them. He further says that he was never offered more than 3¢ by anyone for his gas delivered at the well in the Richland Field.

(4) Sam D. Hunter, who is one of the wealthiest independent operators in the business, says in his affidavit that he has been in the business since 1916 and that he owned considerable acreage and drilled a number of wells in both the Monroe and Richland fields until he disposed of most of his properties in 1930. He details one sale made by him of a large amount of gas at 3¢ per MCF and stated that he had operated several smaller properties in the Richland field and that the prevailing market price for gas at the well in that field was 3¢.

This proof of actual sales at the well in the Richland field and of the maintenance of an open market at the well during the period of interest here in which gas was freely bought and sold at 3¢ per MCF is, independent of any opinion given by the well informed experts who made these affidavits, sufficient to establish a wellside price of 3¢ per MCF unless met by competent and admissible proof to the contrary.

We then have our second question: Is there such proof?

The affidavits of Mr. Gilbert P. Bullis, the attorney for the petitioners, (**R. 42, R. 81**) are substantially a repetition of the statements in the answer, which was likewise verified by Mr. Bullis (**R. 33**). Although in his affidavits Mr. Bullis states that he has personally read and examined all of the contracts of gas sales in the field, it is evident from the affidavits as a whole and from specific recitals in the affidavits that he is referring to the so-called pipe line contracts as being all of the sales of gas from the field; in

fact, he says in his affidavits (**R. 44, R. 83**) that all of the sales of gas produced in the Richland field are eight sales which he names, all of which were either the so-called pipe line sales or sales which were made at 3¢ per MCF or less. It is reasonable to conclude that if after thoroughly familiarizing himself with what he considered to be all of the contracts for the sale of gas during the period with which we are here concerned he names certain contracts as being all, these are the only contracts with which he is familiar. There are more than that many written contracts either filed in evidence or stipulated; and these are in addition to contracts not shown to be written which are testified to as heretofore shown.

SEE:

Defendent's Exhibit 3, R. 52;
Defendent's Exhibit 12, R. 68;
Defendent's Exhibit 13, R. 68;
Contract No. 1, R. 69;
Contract No. 2, R. 72;
Contract No. 3, R. 72;
Contract No. 4, R. 73;
Contract No. 5, R. 74;
Contract No. 6, R. 75;
Contract No. 13, R. 76, referred to in the affidavit of S. D. Hunter;
Contract No. 14, R. 76, referred to in the affidavit of E. N. Florsheim;
Contract No. 15, R. 77, referred to in the affidavit of W. C. Feazel;
Contract No. 16, R. 77, (may be one of those referred to in the affidavit of E. N. Florsheim).

If an attorney as a result of trying cases which deal with the price of gas is to be classified as an expert in oil and gas so that his ipse dixit in affidavit form is to be regarded as evidence sufficient to raise an issue of fact which cannot be resolved on a motion for summary judgment, we

venture to say that it will prove impracticable in most cases to resort to the summary judgment proceeding, as most attorneys have tried cases involving to some extent the same questions which are presented in the particular case in which the motion may be made. Every patent attorney will be in position to qualify as an expert and to prevent summary judgment being rendered in a patent suit by saying that the statements made by experts in their affidavits are untrue and that he as an expert does not agree with them. The lawyer in a workman's compensation case who has handled many cases involving injuries of the same character as those which form the basis of a suit may prevent a summary judgment from being rendered even though all of the medical opinion is to the contrary by qualifying himself as an expert from what he has heard innumerable doctors testify in prior cases and saying that these medical experts are all wrong.

The purpose for which the summary rule procedure was devised will be defeated if affidavits such as those of counsel here are to be taken as sufficient to prevent the rule from being applied.

Respectfully submitted.

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